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TRANSCRIPT OF PROCEEDINGS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF:

EB DOCKET NO. 04-381

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., ET AL.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF)
)
FLORIDA CABLE TELECOMMUNICATIONS)
ASSOCIATION, INC.; COMCAST)
CABLEVISION OF PANAMA CITY, INC.;)
MEDIACOM SOUTHEAST, L.L.C.; AND COX)
COMMUNICATIONS GULF, L.L.C.,)
)
Complainants,)
)
v.)
)
GULF POWER COMPANY,)
)
Respondent.)
)

EB Docket
No. 04-381

Monday,
November 21, 2005
9:30 a.m.

TW A-363
445 Twelfth Street, S.W.
Washington, D.C.

BEFORE: RICHARD L. SIPPEL
Chief Administrative Law Judge

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I-N-D-E-X

Witness Direct Cross Redirect Recross

None

Start Time: 9:35 a.m.

End Time: 11:42 a.m.

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P-R-O-C-E-E-D-I-N-G-S

9:35 a.m.

ADMIN. JUDGE SIPPEL: I want to call this conference to order. On the record. This is a status conference that was called pursuant to my order, FCC05M -54. It's also incident to a formal request for a conference that was filed by complainants on November the 7th -- November 7th of this year. And also, I want to make reference that there was a -- note for the record that there was an informal off the record telephone conference that discussed certain of the items that we will be discussing today. That was on November the 9th, 2005. This is the case of Florida Cable Communications Association, et al. versus Gulf Power Company. Now, I am going to, at this time, since it has been a while, I'm going to ask counsel to please identify themselves for the record. I'm going to start with the Bureau counsel, please.

MR. LIEN: Rhonda Lien for the Enforcement Bureau for the Commission.

ADMIN. JUDGE SIPPEL: Good morning.

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1 Thank you.

2 MS. GRIFFIN: Lisa Griffin, also for the
3 Enforcement Bureau.

4 ADMIN. JUDGE SIPPEL: Thank you.

5 MR. SHOOK: James Shook.

6 ADMIN. JUDGE SIPPEL: Good morning. And
7 on behalf of the complainants?

8 MR. SEIVER: John Seiver.

9 ADMIN. JUDGE SIPPEL: And.

10 MR. COOK: Geoffrey Cook.

11 ADMIN. JUDGE SIPPEL: Good morning. And
12 on behalf of Gulf Power?

13 MR. LANGLEY: For Gulf Power, Eric
14 Langley.

15 MR. CHAPMAN: Nathan D. Chapman.

16 MR. PETERSON: And Ralph Peterson.

17 ADMIN. JUDGE SIPPEL: Okay. Thank you
18 very much. I have a just as a --as a -- as a
19 preliminary matter, it's -- I just want to tell you
20 of the passing of a longtime colleague of mine, Judge
21 John Frisiak, last Wednesday, and I just wanted to
22 acknowledge that and pass that along. For purposes

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1 of this morning's conference, I'm going to start with
2 the third discovery order, and that's with respect to
3 those items that seem to be outstanding according to
4 my count. Again, as a -- as a follow up from what we
5 were discussing off the record. I will then, after
6 completing that review, which I hope will not take
7 long, I do want to give Mr. Seiver an opportunity to
8 discuss the items that he has submitted in his pre -
9 hearing report, his pre -- he has a requested a
10 conference. And I am certainly, if there's anything
11 that the parties want to tell me before we start, and
12 if they, you know, if there's something of
13 significance that has developed, by all means, speak
14 up now and let me know. The last item to be
15 discussed this morning on my agenda is the remaining
16 procedural dates and exactly where the parties stand
17 with respect to meeting those dates. That's why they
18 call it the status conference.

19 Okay. Let's start with -- does anybody
20 have anything that they want to say as a preliminary
21 matter? No. Okay. Let me start very -- so we can
22 move this along -- I am at the -- my third discovery

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1 order, FCC05M-56, and it's my ruling with respect to
2 request number one. That has to do with instances
3 when Gulf Power could not accommodate attachers. And
4 as I understand from what you've submitted, Mr.
5 Langley, that there are really no situations where
6 that has occurred where you contemplate that being
7 occurred and that there's a stipulation being
8 negotiated.

9 MR. LANGLEY: Your honor, that is the
10 subject of a stipulation. Our position on that is
11 that we don't -- there are not a significant number
12 of instances where we have denied expanding capacity
13 to accommodate the cable operators, but beneath that
14 layer, our position, and one of the things that's
15 been born out in the responses and in the argument
16 between the sides on whether those responses are
17 sufficient is that where a pole requires make -ready,
18 where it required make -ready to host them, we -- we
19 are saying as a matter of contention that that is an
20 instance where we were unable to accommodate them, of
21 course, without the make-ready. And I think that --
22 now, I think that that issue has been fairly squared

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1 up between the parties, and I think your honor
2 recognizes that in -- in the -- in the ruling on
3 request number one.

4 ADMIN. JUDGE SIPPEL: All right. Okay.
5 Anything on that Mr. Seiver?

6 MR. SEIVER: Mr. Cook.

7 ADMIN. JUDGE SIPPEL: Mr. Cook.

8 MR. COOK: Good morning, your honor.
9 This question is motivated by the Alabama Power
10 Standard which says indicate where you've had a lost
11 opportunity where you have not been able to
12 accommodate a higher valued use of your own or a
13 third-party attacher, so the question is actually one
14 of the most central to what your honor will be
15 deciding in March: Is there an instance where you
16 have missed out, where, in the words of Alabama
17 Power, you have had a foreclosed opportunity to put a
18 third party on who's going to pay more. Now if -- if
19 the answer is as your honor has indicated, an
20 admission that there are no instances where it was
21 unable to accommodate attacher, that is a suffi ci ent
22 answer to the resolution of this question.

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1 ADMIN. JUDGE SIPPEL: So then where do we
2 stand on this. I mean I know you did tell me
3 something very specific, Mr. Langley, but in terms of
4 the bottom line, where do we stand on handling this
5 by way of stipulation? Can we do it?

6 MR. LANGLEY: I think as a -- as a bottom
7 line matter, this -- we're really at a point where
8 it's just legal argument between the parties. I
9 think they have what we they want, and we know what
10 arguments we want to make. I don't think there's any
11 further discovery needed on this issue. I mean I
12 think Geoff just said, they -- they have what they
13 want.

14 ADMIN. JUDGE SIPPEL: Okay. Mr. Seiver,
15 anything --

16 MR. SEIVER: Just as a supplement and for
17 what Mr. Langley said and Mr. Cook said, probably we
18 dispute, which I've, you understand, we're going to
19 dispute everything, as to the significance of that.
20 I mean, you know, Mr. Langley has said that if they
21 actually did make -ready or anything in order to
22 accommodate a pole, that mean s it was at full

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1 capacity, etcetera, etcetera. We don't -- we
2 disagree with that. So by stipulating to the fact
3 that, you know, poles had been changed out and people
4 have been accommodated, we're not agreeing oh, then
5 that pole was at full capacity --

6 ADMIN. JUDGE SIPPEL: Right.

7 MR. SEIVER: -- beforehand, and so we
8 still -- we still have a dispute over what the
9 significance of the stipulation is, and we might have
10 a little problem with our wording of it, because I
11 think when we went back and forth with the draft,
12 each of us was trying to set it up for our legal
13 issue.

14 ADMIN. JUDGE SIPPEL: Sure.

15 MR. SEIVER: And that could be a little
16 bit of an issue that's left between us to negotiate.

17 ADMIN. JUDGE SIPPEL: Sure. Okay. No,
18 and I can understand that. But I -- but I -- where -
19 - where I -- where I want to come out on this is, you
20 know, on an item by item basis, what is it that I can
21 -- I'm -- right now I'm going to rely on the fact
22 that there will not have to be any, certainly any

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1 substantial, proof offered with respect to request
2 number one. It's a fact stipulation that I'm
3 interested in. I'm not -- I mean if you can -- if
4 you can stipulate to a legal conclusion, that's even
5 better, but I'm not expecting that. But if I can get
6 you to -- if you will, rather, stipulate to the facts
7 in underlying request number one so that we don't
8 have to bother with any further discovery rulings on
9 that, then that's -- that's my job. I'm satisfied.
10 So I'm going to -- Mr. Cook?

11 MR. COOK: Yes. Your honor , and I would
12 add by way of clarification that really what's
13 underlying the parties' differences here is in the
14 order FCC05M-50 in ruling on our document request 14,
15 you had said Gulf Power still has the burden of
16 proving that if virtually any pole can be changed out
17 and that it has historically done so when needed or
18 crowded, there are still poles that it can prove to
19 be at full capacity. I think that's the source of the
20 parties difference here is we only learned very late
21 in this case that they were going to take the
22 position that any pole at some unspecified time that

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1 has done make -ready or change -out meets the Alabama
2 Power definition of full capacity. We're motivated
3 by what your honor had said as late as last December
4 saying well, we've got to have proof by a specific
5 pole, and you used the phrase 'pin down one -by-one
6 poles on an individual basis.' We're trying to
7 determine which one, from our perspective,
8 considering that the industry practice is whenever
9 somebody new comes along, they are charged th e
10 expense of a substitution of a larger pole and Gulf
11 Power is fully made whole for that and indeed gets a
12 larger pole with more space. So looking at that,
13 we're thinking okay, well where is there a pole truly
14 at full capacity where that cannot happen. Where are
15 those limited number of situations? And that, I
16 think, is where we look at the sentence in your order
17 here saying, given that that's Gulf Power's practice,
18 that that's the way the industry works, where are
19 those few poles where they could not acc ommodate an
20 additional person. And if -- and if, as your honor
21 said, there is an admission on the record now that
22 there are no instances where it cannot do that, then

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1 as to this question with the clarification Mr. Seiver
2 and I have added, then I think we can move to the
3 next one.

4 ADMIN. JUDGE SIPPEL: All right. Well,
5 let me just say very briefly, that with respect to
6 what I -- I was writing in October -- on October
7 12th? Is that right?

8 MR. COOK: Right.

9 ADMIN. JUDGE SIPPEL: Well, as -- just as
10 yourself, as you have indicated, I -- you know, I
11 continue to get educated as things go along here. So
12 that was before I saw the last go around on request
13 number one. My third discover order, I tried to
14 focus, as I understand it, as it's being presented to
15 me over this series of one, two, and three discovery
16 orders. I've come to the conclusion that I'm
17 convinced that this is basically what the state of
18 the facts are. That there's no -- there really is --
19 not to any substantial degree anyway, is there ever
20 going to be a pole that Gulf Power can't accommodate
21 a new attacher for, new or old attacher. Is that
22 essentially right?

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1 MR. COOK: Your honor, that's more or
2 less true. I don't want -- I don't want this to be
3 construed as a -- as a statement that we will always
4 perform, make -ready or expand capacity, but as a
5 practical matter, that's how it has worked, and there
6 are no present plans to --

7 ADMIN. JUDGE SIPPEL: Go ahead. I
8 couldn't ask for anything more. I mean that's --
9 that's -- that's fine. That's fine. And then
10 whatever legal conclusions there are to be drawn from
11 that, that's going to be you know, that's -- that's
12 in the proposed findings. But do please continue to
13 work on getting some language that you can agree
14 upon, and I will be more than anxious to sign a
15 stipulation to whatever the effect is that you all
16 can agree to. Okay. Let's move on to then request
17 number two, which is the accounting books and
18 records. We've discussed that, I think, at
19 considerable, I'm not sure about detail, but we
20 certainly got the intensity of what was going there
21 at our telephone session. And I think there's a date
22 of December 9th when this is due. Again, these are

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1 accounting books and records with respect to document
2 request number two. Can you just give me an -- an
3 up-to-date on that, Mr. Langley? Is that being done?
4 Has it been done or?

5 MR. LANGLEY: Your honor, I believe it
6 has -- we've begun that process, because during the
7 depositions last week, we actually gave them some of
8 the underlying FERC Form 1 data from which we have
9 pulled the numbers on which our calculations are
10 based. I think this is something John and I can
11 probably work out. I mean we don't intend to -- to
12 limit their access to FERC Form 1s, and frankly
13 they're a public record anyway.

14 ADMIN. JUDGE SIPPEL: Okay. Mr. Seiver?

15 MR. SEIVER: Well, yes. And the FERC
16 Form 1s are something that everybody has access to,
17 and we've used that. What we were trying to pin down
18 and which is the more difficult issue are the
19 unreimbursed costs. The FERC Form 1s shows how
20 everything goes in to a particular category under the
21 accounting records and the account 593 or account
22 583, and taking the witness through that last week,

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1 it appears that every cost is booked to an account.
2 Some costs are reimbursed, and I have not been able
3 to get a handle on unreimbursed costs. And that's
4 what we were looking for. I think that's really the
5 issue. We're trying to find out what costs are
6 unreimbursed. And at least it appears that there are
7 none. But it might be the legal issue that Mr.
8 Langley will want to say well, it doesn't matter
9 whether they're unreimbursed or not. These are costs
10 that have some relevance to our conclusion about
11 capacity. But we saw this is as a cost case that
12 there's marginal costs, and then there's more than
13 marginal costs, so we wanted to know if the costs
14 have been paid, fine, then we can move on. If some
15 costs have not been paid, then I wanted to know what
16 those costs are, because I would think that's going
17 to be an element of their -- of their proof. So I
18 still need to find something that quantifies that,
19 and a perfect example of this is the Knology. And
20 I'll just briefly, your honor, that was one of the
21 descriptions of evidence. And itemization to
22 evidence is then the Knology build in Panama City,

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1 which, correct me if I'm wrong, I think it was about
2 14,000 poles? Is that right? Which is a fairly
3 substantial undertaking by Gulf Power to -- to -- to
4 build for Knology, not one of the complainants, not
5 one of our clients.

6 MR. LANGLEY: There were 14,000
7 permitted.

8 MR. SEIVER: Fourteen thousand -- well --
9 and that --

10 ADMIN. JUDGE SIPPEL: I'm sorry. Say
11 that again? Fourteen thousand.

12 MR. LANGLEY: Fourteen thousand
13 permitted.

14 ADMIN. JUDGE SIPPEL: Permitted. Okay.

15 MR. SEIVER: Not that they were -- they
16 were not new poles set. And we went through, and
17 this leads into our -- our next issue about the
18 document inspection and the Bates stamping. We got a
19 lot of documents that we saw in Pensacola in the main
20 office that included make -ready documents for that
21 job, which we wanted to look at, because we knew that
22 Gulf Power said it was relying on those. And we got

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1 a nice thick summary, and it looked like this is
2 great. This has got permit numbers. It's got
3 whether make-ready was required. It's got the cost
4 of the make-ready, and even who paid. And I -- I
5 thought wow, we finally hit a good document, but at
6 the deposition, the witness said, well, you know
7 what, this got kind of complicated. We never
8 finished this one. We did one electronically. So I
9 asked for that, and a few weeks later, I did get an
10 Excel sheet that had more detail as to those permit
11 applications written out, you know, what was done,
12 the costs, not on a pole-by-pole basis, because the
13 permit would sometimes be for one pole, 18 poles,
14 270 poles. And the witness explained well, you have
15 to go back and find the work order that's associated
16 with that permit which I'm not sure if I would even
17 be able to do that if somebody gave me a box of
18 documents and then said that even within there,
19 there's probably not going to be a pole-by-pole
20 identification. They'll say okay, in this run of 15
21 poles here, we got to change three out, tighten the
22 sag on another one and then, you know, there's this

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1 \$28,000 charge which looks like it was paid. So I
2 said, all right, and I even asked. I said, in your
3 knowledge, since you're the one -- this is the
4 witness that was creating this form, and he did say
5 there was another one, and we haven't talked about
6 whether we can get the updates to the other forms
7 that were created electronically -- where -- was
8 anything not reimbursed. And he said, not to his
9 recollection. So I feel like I'm on a bit of a, not
10 a wild goose chase, but a bit of a fishing
11 expedition. I think Mr. Langley said, you know,
12 there are a lot of fish in the sea, and I got to go
13 find them. And -- well, when I said, is this -- is
14 this one of the ones you were talking about or this
15 one, because I can't -- I can't find evidence of
16 unreimbursed costs. Now maybe there isn't. But
17 maybe there is.

18 ADMIN. JUDGE SIPPEL: Well, yes. Maybe
19 there is, and before you, yes, let me just make this
20 comment. I think, and I -- and I -- I had said
21 something about this in one of my latest rulings,
22 there must -- normally, I think normally businesses,

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1 when they have an unreimbursable cost, it reaches a
2 point where they just write them off. And they'll
3 take a, you know, they get the benefit of a tax loss
4 or something on it. I'm not -- I'm not -- I'm not
5 that much -- I'm not that much -- I don't have that
6 much information to be able to say exactly what's
7 done, but I mean isn't that true? You have books and
8 records? You're going to have unreimbursable costs
9 or costs which are outstanding or were late? You
10 know they reach a certain period of time when you
11 write them off. So if you've got accounting records
12 that reflect that, I mean how -- how precise do we
13 need it with respect to, you know, the kind of costs
14 you're talking about?

15 MR. LANGLEY: May I address that --

16 ADMIN. JUDGE SIPPEL: Yes. -- the one to
17 address it. Yes.

18 MR. LANGLEY: -- that John make. Part of
19 the -- part of the issue with reimbursed costs is a -
20 - a fundamental difference in legal positions, and
21 what they are saying with respect to reimbursement is
22 if you have been paid all of your make -ready, then

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1 you have been fully reimbursed. And what we say is,
2 no, there are costs that go into building and
3 maintaining the pole that are not recovered through
4 the cable rate. For example, here's -- here's a good
5 example, and this is one of the key differences
6 between the parties. The -- aside from the fact that
7 the cable rate is based on imbedded or historical
8 costs, not current costs, there is also no allocation
9 for the use of grounds and arresters which are
10 necessary to maintain a pole line, particularly in
11 Northwest Florida where you have the kind of
12 incidents of lightening like we do. So part of our -
13 - part of our methodology, the methodology that we
14 are saying should be in place for all poles but for
15 the purposes of this proceeding, for the grounded
16 poles, attempts to recover all of those costs is a
17 fully loaded cost which we are seeking to recover on
18 an allocated basis from the cable operators.

19 ADMIN. JUDGE SIPPEL: All right. So
20 you're universal cost go over and above what -- what
21 -- well, it -- it -- it what -- it goes over and
22 above what's provided for, you think, in the formula?

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1 MR. LANGLEY: Absolutely.

2 ADMIN. JUDGE SIPPEL: Okay. It's not
3 quite-- well, when the formula was adopted, was that
4 -- and there were rule -- there was rulemaking going
5 in, was that considered?

6 MR. LANGLEY: There have been rulings on
7 the treatment of various aspects of the formula.
8 Most of those rulings, though, predate importantly
9 the C change from voluntary rate regulation to a
10 taking and just compensation, and so --

11 ADMIN. JUDGE SIPPEL: All right. All
12 right. Yes. But wait a minute. Wait a minute. If
13 you followed my question, my question was in
14 rulemaking, and it may be a series of them, but when
15 the ultimate rulemaking proceeding was -- was
16 conducted -- was conducted, was there data or and --
17 and evidence considered with respect to such costs as
18 you're referring to here? You know the grounds and
19 arresters, these kinds of things that you say are not
20 covered by the -- by the formula?

21 MR. LANGLEY: There have been but I would
22 -- I would gather that the parties do not agree on

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1 what those rulemakings say. What they have said is
2 that grounds and arresters are not provided for in
3 the formula. They haven't said that they -- there
4 should not be an item of recovery, but they'd
5 probably disagree with that interpretation.

6 ADMIN. JUDGE SIPPEL: Okay. Okay. Let
7 me ask this question then. If you do come up with --
8 if you do -- if you do offer evidence on that, if
9 evidence gets offered on that, and this -- this is
10 not -- this is not an evidentiary ruling, I'm just
11 saying hypothetically, if that kind of evidence comes
12 in in some way, shape, or form, how -- how
13 significant would you expect that to be, I mean in
14 terms of dollars. Yes. I don't need a dollar, but I
15 mean how much? Is it going to be very substantial?

16 MR. LANGLEY: It will be. It makes a
17 several dollar per pole difference. But that's not
18 the only cost that we believe is not recovered
19 through the cable rate and that should be recovered.
20 Terry Davis, who was deposed pretty much the better
21 part of this past Friday, spoke to a lot of those
22 particular issues about the items of cost that we

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1 content are not recovered as did Mike Dunn last
2 Wednesday. I mean the y know what costs we say are
3 not recovered, but --

4 ADMIN. JUDGE SIPPEL: Yes, but how does
5 he -- I'm sorry to interrupt, but how does he know
6 that the amount that you're talking about is accurate
7 if he doesn't have the documents that underlie the
8 numbers that you give?

9 MR. LANGLEY: their in the FERC Form 1.

10 ADMIN. JUDGE SIPPEL: They're in the FERC
11 Form 1?

12 MR. LANGLEY: Right. I would --

13 ADMIN. JUDGE SIPPEL: So would you go
14 beyond -- let me ask this. Well, would you go beyond
15 the FERC Form 1 in terms of what you would be asking
16 for?

17 MR. LANGLEY: All of our cost data that
18 we input into what we contend is the proper formula
19 is available on the FERC Form 1 with one exception,
20 and that is for determining the amount that it costs
21 to put grounds and arresters on the pole line. We
22 have used our JETS system, which is a Job Estimating

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